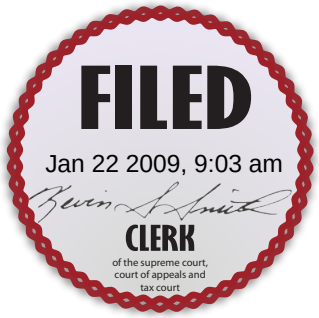

ATTORNEY FOR APPELLANT:

TERI A. CUMMINS
The Sandy Law Firm
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana
Indianapolis, Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

JAIRO ARMAS VELASQUEZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0806-CR-523
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0610-FA-19

JANUARY 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

Jairo Armas Velasquez, ("Velasquez") appeals from the trial court's sentencing order after pleading guilty to dealing in cocaine,[1] a Class A felony. Velasquez raises the following issues for our review:

I. Whether the trial court's sentencing statement adequately explains the reasons for imposing the executed sentence and declining to suspend any of the sentence to probation; and

II. Whether Velasquez's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

FACTS AND PROCEDURAL HISTORY

On October 17, 2006, Velasquez was in possession of 6.4 grams of cocaine in nine individual packages, and a bag containing twenty grams of marijuana. Ultimately, Velasquez pleaded guilty to Class A felony dealing in cocaine. One of the terms of Velasquez's plea agreement was a twenty-five year cap on the executed portion of his sentence. The trial court held two hearings before sentencing Velasquez to a term of twenty-five years executed in the Department of Correction. Velasquez appeals.

DISCUSSION AND DECISION

I. ADEQUACY OF THE SENTENCING STATEMENT

Velasquez argues that the trial court's sentencing statement does not adequately explain the reasons for the sentence imposed, including the trial court's decision not to suspend a portion of Velasquez's sentence to probation. The State argues that the sentencing

[1] *See* Ind. Code § 35-48-4-1.

statement sufficiently explains the trial court's decision to impose the twenty-five year executed sentence.

Velasquez argues that the trial court abused its discretion by finding aggravators and mitigators orally at the sentencing hearing, but then writing a sentencing statement that does not explain the reasoning the court used to arrive at the sentence imposed.

In *Anglemyer v. Stat*e, 868 N.E.2d 482, 490 (Ind. 2007) *clarified on rehearing*, our supreme court found that the 2005 amendments to the sentencing statutes do not prohibit a trial judge from identifying facts in aggravation or mitigation when sentencing a defendant. However, should a trial court choose to find the existence of aggravating and mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id*. The trial court is required to issue a statement of the court's reasons for selecting the sentence it imposes for a felony conviction. *See* Ind. Code § 35-38-1-1.3. The approach employed by Indiana appellate courts in reviewing sentences in non-capital cases such as the case at bar is to examine both the written and oral sentencing statements to discern the findings of the trial court. *See McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007).

Here, at the May 16, 2008 sentencing hearing, the trial court found the following mitigating circumstances: 1) no prior criminal felony convictions ; 2) the undue hardship on Velasquez's young children if he is incarcerated; 3) the undue hardship on Velasquez's

fiancée who suffers from various physical problems; 4) his high school education and a few years of education beyond that; 5) a certain degree of cooperation with law enforcement; and a low likelihood of committing further crimes. *Tr.* at 40-41. At that same sentencing hearing, the trial court found Velasquez's failure to take full responsibility for his actions as an aggravating factor. *Id.* at 40. After noting that the amount of cocaine and number of packages suggested that Velasquez was more involved in drug dealing than he admitted, the trial court found that the mitigators outweighed the aggravators, accepted the plea agreement, and sentenced Velasquez to twenty-five years in the Department of Correction. *Id.* at 41.

The trial court's written sentencing order listed as aggravating factors that Velasquez was in the country illegally and that the amount of cocaine and number of packages suggested that Velasquez was more involved in drug dealing than he admitted. *Appellant's App.* at 21. The trial court listed as mitigating factors that Velasquez had no prior felony convictions, that he had a high school education, and that incarceration would cause an undue hardship on his dependents. *Id.* The trial court found that the mitigating factors outweighed the aggravating factors. *Id.*

When considered as a whole, the trial court's sentencing statement adequately explains the trial court's reasoning behind imposing the twenty-five year sentence. Accordingly, in this challenge of the adequacy of the trial court's sentencing statement, we find that the trial court did not abuse its discretion

Velasquez also takes issue with the trial court's use of his immigration status as an aggravating factor. Velasquez claims that the trial court treated Velasquez more harshly than other defendants because of his immigration status. We disagree.

In the February 29, 2008 sentencing hearing, the trial judge discussed his concern about Velasquez's eligibility for probation due to his immigration status and stated his position that Velasquez should receive somewhere between the minimum and presumptive sentence for his crime. Velasquez acknowledged at the time of the sentencing hearing that by pleading guilty to a Class A felony, he was subject to deportation.

In *Samaniego-Hernandez v. State*, 839 N.E.2d 798, 806 (Ind. Ct. App. 2005) *abrogated on other grounds by Anglemyer*, 868 N.E.2d 482 (Ind. 2007), we discussed the use of a defendant's immigration status for purposes of sentencing, noting that a defendant's status as an illegal alien is more properly viewed as an aggravator than a mitigator. *Id*. at 806. We cited to *Yemson v. U.S.*, 764 A.2d 816, 819 (D. C. App. 2001), a case which held that for sentencing purposes, a trial court cannot treat a defendant more harshly than any other citizen solely due to his national origin or alien status. The court in *Yemson* went on to state that its holding did not mean that a court must close its eyes to a defendant's illegal alien status and disregard for the law, including immigration laws. *Id*.

In the present case, Velasquez would be violating a condition of his probation every day he remained in Indiana illegally, and had already disregarded our country's immigration laws for twelve years prior to the commission of the current offense. The trial court correctly considered Velasquez's immigration status as an aggravating factor.

A defendant is not entitled to serve a sentence in a probation program. *Brabandt v. State*, 797 N.E.2d 855, 860 (Ind. Ct. App. 2003). Instead, placement in probation is a matter of grace and a conditional liberty that is a favor, not a right. *Id*. The sentencing range for a Class A felony is between twenty and fifty years, with the advisory sentence being thirty years. *See* Ind. Code § 35-50-2-4. While Velasquez received a twenty-five year executed sentence, the maximum allowable under the plea agreement, Velasquez received a sentence that was less than the advisory sentence for his crime. We do not find that the trial court treated Velasquez more harshly than any other citizen because of his immigration status.

II. INDIANA APPELLATE RULE 7(B)

Velasquez challenges his sentence as inappropriate in light of the nature of the offense and the character of the offender.

Ind. Appellate Rule 7(B) provides that "the court may revise a sentence ... if, after due consideration of the trial court's decision, the reviewing court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

Regarding the character of the offender, we find that Velasquez is a high school graduate with some education beyond that, who has not much of a criminal history, and who has three young children who depend on him. However, Velasquez was living in the United States illegally for twelve years before the instant offense, and operated a vehicle without ever having received a license. Velasquez's character is not the worst, but he has shown a

disregard for the laws of this country.

Regarding the nature of the offense, Velasquez was in possession of twice the amount of cocaine required to enhance the offense to a Class A felony, and the cocaine was in nine individual packages with intent to deliver it to others. Velasquez was given a sentence that was five years shorter than the advisory sentence for the crime.

We cannot say that the sentence was inappropriate given the nature of the offense and the character of the offender.

Affirmed.

RILEY, J., and MATHIAS, J., concur.